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Supreme Court, U.S.
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No. 95-969

In the Supreme Court of the United States

OCTOBER TERM, 1995

ERMA MILLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court clearly erred in concluding that punitive damages under 26 U.S.C. 7431(c)(1)(B) are unavailable in this case because the disclosure of tax return information was neither willful nor grossly negligent.

2. Whether statutory minimum damages under 26 U.S.C. 7431(c)(1)(A), of $1,000 for each unauthorized disclosure of tax return information, are to be calculated based upon the single disclosure of such information to a newspaper reporter or based upon the 181,734 copies of that newspaper distributed to its subscribers.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-13) is reported at 66 F.3d 220. The opinion of the district court (Pet. App. 14-20) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 1995. The petition for a writ of certiorari was filed on December 18, 1995 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves a suit against the United States seeking damages under Section 7431 of the Internal Revenue Code, 26 U.S.C. 7431.[1] That statute authorizes an award of damages against the United States for the knowing or negligent disclosure of a taxpayer's "return or return information * * * in violation of any provision of [S]ection 6103 [of the Code.]" 26 U.S.C. 7431(a). Section 7431(b) provides that there shall be no liability in the case of a "disclosure which results from a good faith, but erroneous, interpretation of [S]ection 6103." 26 U.S.C. 7431(b). Under Section 7431(c), a successful plaintiff may recover costs, actual damages, punitive damages in the case of willful or grossly negligent disclosures, and a minimum damage award of $1,000 for each act of unauthorized disclosure. 26 U.S.C. 7431(c).

a. In November 1989, the Internal Revenue Service made a jeopardy assessment against petitioner and Lynn Stites, her former husband, concerning their joint income tax liability for 1987. Petitioner brought an action in district court challenging the jeopardy assessment. On the day before the case was to go to trial, the IRS stipulated that the jeopardy assessment should be abated (Pet. App. 4-5).

Shortly thereafter, an article appeared in the Valley Edition of the *Los Angeles Times*, captioned "Fraud Inquiry Target Wins A Round In Court" (Pet. App. 15). The article stated (*id.* at 5):

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[1] Petitioner also sought damages for unauthorized tax collection activity under 26 U.S.C. 7433. The district court dismissed that claim and the court of appeals affirmed (Pet. App. 6-8). Petitioner does not seek further review of that aspect of the decision below.

> Attorney Lynn B. Stites, the focus of a criminal investigation in the "Alliance" insurance fraud case, has won a skirmish in his battle with the federal government, which bungled an attempt to seize $2.8 million it says Stites owes in unpaid taxes, according to papers filed in federal court in Los Angeles.

The article noted that the United States had filed a notice that the challenged jeopardy assessment would be abated and that (*ibid.*)

> [l]awyers in the U.S. Attorney's office in Los Angeles could not be reached; and an IRS spokeswoman declined comment on the case. An IRS official [Richard Davega] admitted that the agency has obtained little of value from the Stiteses. "Let's just say it was insignificant," he said.

It is this last remark of Mr. Davega that forms the basis of petitioner's claim for damages under Section 7431 in this case. Petitioner's theory is that each of the 181,734 copies of the Valley Edition of the *Los Angeles Times* constitutes an actionable unauthorized disclosure of her return information. Petitioner does not contend that she sustained any actual damages in this case. Instead, she contends that she is entitled to the statutory minimum damages of $1,000 for each such "disclosure" (Pet. App. 8-9). She seeks a total award of $181,734,000, plus punitive damages.[2]

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[2] Petitioner originally sought damages of $1.1 billion in this case, representing $1,000 for each of the 1.1 million copies of the newspaper circulated by the *Los Angeles Times*. The amount of her claim was subsequently reduced after it was determined that the article concerning Mr. Stites was carried only in the Valley Edition of the paper (Pet. App. 10).

b. The district court held that Mr. Davega's response to the reporter's question constituted an unauthorized disclosure of petitioner's return information. The court concluded, however, that Mr. Davega's disclosure was not willful or the result of gross negligence and that "[p]unitive damages are [thus] not authorized" in this case under 26 U.S.C. 7431(c)(1)(B) (Pet. App. 20).

The court further held that "[o]ne disclosure only was made" by Mr. Davega (Pet. App. 20). Because no actual damages were proven (*id.* at 19), the court concluded that petitioner was entitled only to the statutory minimum award of $1,000 in this case (*id.* at 20).

2. Petitioner appealed the award of $1,000 in damages, and the court of appeals affirmed (Pet. App. 1-13).[3] The court rejected petitioner's claim that Mr. Davega's single statement to the reporter constituted over 181,000 acts of disclosure. In so ruling, the court rejected petitioner's reliance on *Mallas* v. *United States*, 993 F.2d 1111 (1993), in which the Fourth Circuit held that 33 letters disclosing return information constituted 66 acts of disclosure because each of the letters was addressed to *two* people—to husbands and wives who had filed joint income tax returns. The court of appeals concluded that *Mallas* was obviously distinguishable on its facts and that "extending *Mallas* into the current situation is not warranted" (Pet. App. 10). The court emphasized that the text of Section 7431 "punishes 'disclosure,' not subsequent disseminations" (Pet. App. 10) and that

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[3] On appeal, the United States did not challenge the conclusion that an unauthorized disclosure of tax return information had occurred.

"Congress did not intend the bizarre remedy sought in this case" (*id.* at 11).

The court of appeals also held that the district court had correctly "viewed the disclosure as a momentary and insignificant oversight" that was neither willful nor grossly negligent (Pet. App. 11). The court therefore affirmed the district court's refusal to award punitive damages in this case (*ibid.*).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. The court of appeals properly concluded that only one act of unauthorized disclosure was made by Mr. Davega. The repetition by a third party of a single unauthorized disclosure by a government official does not give rise to multiple awards of statutory minimum damages under Section 7431. The statute authorizes an award against the United States only for the unauthorized disclosures of an "officer or employee of the United States" (26 U.S.C. 7431(a)). The statutory minimum damage award is based only on such an "act of unauthorized disclosure" by a government official, not on the repetition of that disclosure by third parties. 26 U.S.C. 7431(c)(1)(A).

If foreseeable repetition of the disclosure occurs by third parties, and if that repetition causes injury to a plaintiff, the plaintiff may seek recovery for that injury as part of the "actual damage[s]" awardable in a proper case. 26 U.S.C. 7431(c)(1)(B)(i). In this case, however, the courts below correctly found that petitioner "suffered no actual damages" (Pet. App. 19).

And, because only one "act of unauthorized disclosure" (26 U.S.C. 7431(c)(1)(A)) was in fact made by Mr. Davega (Pet. App. 10-11), only one award of statutory minimum damages is authorized by Section 7431.

Petitioner errs in contending (Pet. 15-18) that the decision in this case conflicts with the decision in *Mallas* v. *United States*, 993 F.2d at 1124-1125. In *Mallas*, the Fourth Circuit held that the mailing of a revenue agent's report to two spouses living at the same address constituted two disclosures of that information. *Ibid.* The court of appeals correctly concluded in this case that "the factual setting presented in *Mallas* is distinguishable" (Pet. App. 10). In *Mallas*, the revenue officer made the disclosure directly to each person who received it; in this case, the revenue officer made only a single disclosure to a person who thereafter repeated it to others. The court correctly concluded in this case that "the statute punishes 'disclosure,' not subsequent disseminations" and that extending *Mallas* "into the current situation is not warranted" (Pet. App. 10). Moreover, in *Mallas*, the Fourth Circuit quoted the observation of the district court in that case that "[d]amages are not based on the number of persons who may have read or heard the wrongful disclosure * * * [r]ather damages for unauthorized disclosure [are] determined by the number of persons or institutions sent the document." 993 F.2d at 1124.

2. There is no merit to petitioner's assertion (Pet. 7-10) that the decision in this case conflicts with decisions of the Fourth and Fifth Circuits concerning the standard for imposing punitive damages in an unauthorized disclosure case. Section 7431 permits an award of punitive damages for unauthorized

disclosures that are "willful" or "the result of gross negligence" (26 U.S.C. 7431(c)(1)(B)(ii)). The courts have consistently viewed liability for punitive damages under these statutory standards to be inherently fact-specific. See *Mallas* v. *United States*, 95-1 U.S. Tax Cas. (CCH) ¶ 50,294, at 88,072 (1995); *Marré* v. *United States*, 38 F.3d 823, 827 (5th Cir. 1994); *Rodgers* v. *Hyatt*, 697 F.2d 899, 906 (10th Cir. 1983).

In the present case, the district court found that the disclosure by Mr. Davega was inadvertent and, although negligent, was "not willful or grossly negligent" (Pet. App. 18). The court of appeals held that this factual evaluation of the nature of the disclosure by the district court was not clearly erroneous (*id.* at 11). That factual conclusion, concurred in by both courts below, does not warrant further review. See *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317-318 n.5 (1985).

Petitioner has pointed to nothing in the record that would contradict the factual determination made by the two courts below. Instead, as the court of appeals noted in reflecting upon the enormous amount of damages sought in this case for a single act of disclosure from which petitioner "suffered no actual damage[s]" (Pet. App. 19), "the record suggests that Miller and her attorneys have attempted to convert a proverbial molehill into Ft. Knox" (Pet. App. 11).[4]

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[4] Petitioner also errs in asserting (Pet. 10) that the question whether a "willful" disclosure has occurred under Section 7431 should be determined under the standard applied in "responsible officer" cases under Section 6672 of the Code. The Eighth and Ninth Circuits have recognized that the willfulness requirement of Section 6672 is specific to that provision and is unlike other scienter requirements in the Internal Revenue Code. See *Hartman* v. *United States*, 538 F.2d 1336, 1341 (8th

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Cir. 1976); *Maggy* v. *United States*, 560 F.2d 1372, 1375 (9th Cir. 1977), cert. denied, 439 U.S. 821 (1978); *Bloom* v. *United States*, 272 F.2d 215, 223 (9th Cir. 1959), cert. denied, 363 U.S. 803 (1960). See also *Slodov* v. *United States*, 436 U.S. 238, 261 (1978) (Rehnquist, J., concurring) ("It should be apparent from the Court's opinion * * * that this notion of 'fault' may have little to do with other sections of the Tax Code.").